

# United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	James B. Moran	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	00 C 1127	DATE	2/15/2001
CASE TITLE	Royal Source, Inc. Vs. New Tradition Pipe Co. et al.		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

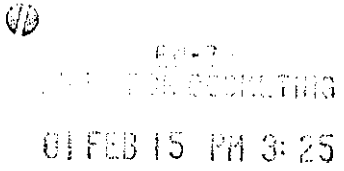

## MOTION:

### Memorandum Opinion and Order

## DOCKET ENTRY:

- (1) ☐ Filed motion of [ use listing in "Motion" box above.]
- (2) ☐ Brief in support of motion due \_\_\_\_\_.
- (3) ☐ Answer brief to motion due \_\_\_\_\_. Reply to answer brief due \_\_\_\_\_.
- (4) ☐ Ruling/Hearing on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (5) ☐ Status hearing[held/continued to] [set for/re-set for] on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (7) ☐ Trial[set for/re-set for] on \_\_\_\_\_ at \_\_\_\_\_.
- (8) ☐ [Bench/Jury trial] [Hearing] held/continued to \_\_\_\_\_ at \_\_\_\_\_.
- (9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]  
☐ FRCP4(m) ☐ General Rule 21 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).
- (10) ☒ [Other docket entry] Enter Memorandum Opinion and Order. Plaintiff complains that those packages and the insert infringe its copyrights. It now moves for summary judgment. We deny that motion. Status hearing set for April 4, 2001 at 9:45am. to stand.

- (11) ☒ [For further detail see order attached to the original minute order.]

<input type="checkbox"/> No notices required, advised in open court. <input type="checkbox"/> No notices required. <input type="checkbox"/> Notices mailed by judge's staff. <input type="checkbox"/> Notified counsel by telephone. <input checked="" type="checkbox"/> Docketing to mail notices. <input type="checkbox"/> Mail AO 450 form. <input type="checkbox"/> Copy to judge/magistrate judge.	courtroom deputy's initials  WAH		number of notices	Document Number  32
			FEB 16 2001	
			date docketed	
			 docketing deputy initials	
			date mailed notice	
		Date/time received in central Clerk's Office	mailing deputy initials	




elaboration and the manner of expressing such instructions is extremely limited. *See Publications International, Ltd. v. Meredith Corp.*, 88 F.3d 473 (7<sup>th</sup> Cir. 1996). But the packaging is much more than the text, and even the instruction insert is more than instructions. We view the totality of the copyrighted material, and that discloses considerably more than marginal originality, at least for the packaging. *See Roth Greeting Cards v. United Card Company*, 429 F.2d 1106 (9<sup>th</sup> Cir. 1970).

Nor is there any real dispute about access. Both Heine and the packager had samples of plaintiff's packaging. Heine wanted to develop competing products, he furnished all the text and he worked closely with the designer in creating the defendant's packaging.

Is there, then, copying? It would be difficult to deny that the packaging designs are in many respects substantially similar. We point out just a few. The text is virtually verbatim, although it could have been changed somewhat. Even though much of it lacks originality, its inclusion with the original aspects of the packaging does contribute to an overall appearance of substantial similarity. The first package, for liquid Klear (and the most dissimilar of the packages) uses a prominent "X-TRA" rather than plaintiff's "XXTRA", has a seal in approximately the same location as the seal on plaintiff's packaging, uses a similar red banner at the top with an identical instruction to the left. The instructions and "Supplement Facts" (an FDA requirement) are in similar locations. The hang-tags both have their text to the right of the vial, text that is very similar, and a banner across the bottom. The capsule packaging has a number of similarities in placement of identical or nearly identical text and block letters in banners, seals, references to guarantees and instructions, depictions of capsules, and font for "Fast Flush" similar to the font for "Fast Flush," are all in similar locations.

The ultimate “test of substantial similarity is copying and improper appropriation.” Ty, Inc. v. LeClair, 103 F.Supp.2d 1047, 1049 (N.D.Ill. 2000). Can we say that any reasonable person would be compelled to determine that any ordinary reasonable observer, comparing the expressions, would have to regard them as substantially similar unless he set out to detect the differences? We think not. The summary judgment standard is not “more likely than not,” but the far more unforgiving “no reasonable person ....” Defendants’ packaging uses a different prominent trademark, somewhat different layouts, often different colors, and a tie-dye background differing from plaintiff’s. We think the distinctions are sufficient to conclude that a reasonable person could reasonably find that there has not been infringement.

Feb. 15, 2001.

  
JAMES B. MORAN  
Senior Judge, U. S. District Court